

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1186

To be argued by
RAYMOND A. LEVITES

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1186

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT M. LINDAU,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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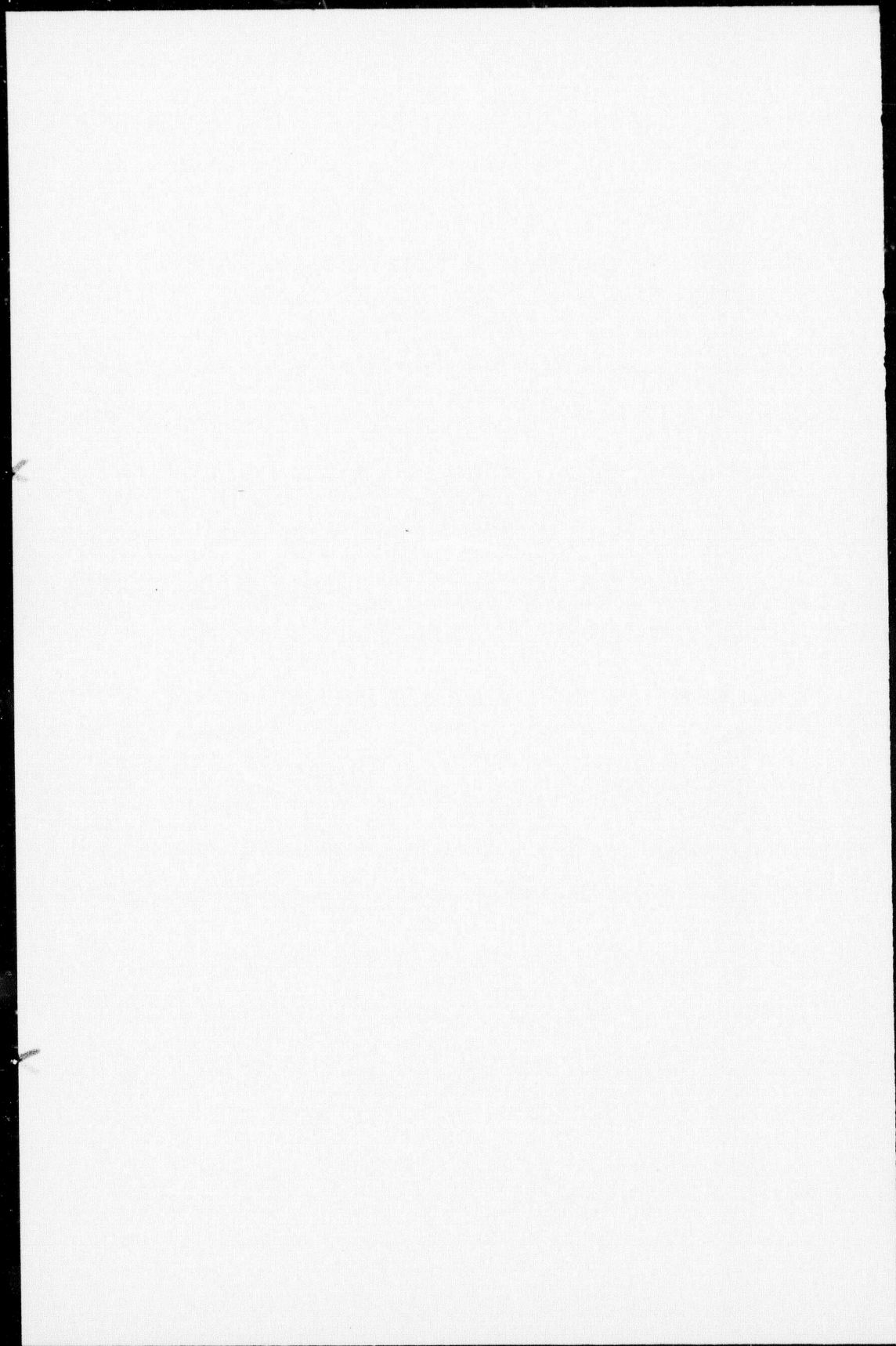
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Docket No. 77-1186

UNITED STATES OF AMERICA,

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—v.—

ROBERT M. LINDAU,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert M. Lindau appeals from a judgment of conviction entered on March 8, 1977, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 76 Cr. 725, filed on August 6, 1976, charged Lindau in fourteen counts with having unlawfully and wilfully embezzled letters which had come into his possession as a letter carrier, in violation of Title 18, United States Code, Section 1709.*

* Lindau failed to comply with bail conditions and instructions of the Pre-Trial Services Agency; on October 19, 1976, a bench warrant was issued by the District Court. He was taken into custody by the Postal Inspector Service in the Eastern District of Tennessee, December 2, 1976, and subsequently removed to the Southern District of New York. On December 23, 1976 the District Court released Lindau on a \$5,000 personal recognizance bond.

The trial began February 1, 1977, and concluded the following day, February 2, 1977, when the jury convicted Lindau of all fourteen counts.

On March 8, 1977, Judge Carter sentenced Lindau to concurrent terms of two years imprisonment with execution of all but ninety days suspended. Judge Carter further placed Lindau on probation for a period of twenty-one months pursuant to the standing probation order of the District Court.

The District Court denied Lindau's application for bail pending appeal; accordingly, Lindau was immediately remanded on March 8, 1977 to commence service of his sentence.

Statement of Facts

The Government's Case

A. Summary

The Government's proof at trial overwhelmingly established the embezzlement by Lindau of substantial quantities of first class mail from the Post Office.

In the spring of 1976, Irene Boris, the chief mail clerk for Sixteen Magazine, Inc. informed representatives of the United States Postal Inspection Service that the magazine had received numerous complaints from customers who had mailed in orders and received no response.

Ultimately, in early May 1976, those sections of the F.D.R. Postal Station in which mail for Sixteen Magazine was sorted were placed under surveillance by Postal Inspectors assigned to the internal theft unit of the service. On May 4th and 5th, 1976 they observed Lindau

surreptitiously and selectively removing mail from pigeonholes designated for routes other than his own, including mail of Sixteen Magazine.

The proof at trial centered around Lindau's activities on May 4, 1976, and May 5, 1976, the day on which he was arrested with approximately two hundred and fifty letters from other mailmen's routes concealed in the bottom of his mail bag.

Special Investigator Frank Popoli testified concerning his observations of Lindau's embezzlement. His testimony was corroborated by Inspectors Christine Macho and Lynford H. Nehil, who also independently observed (and arrested) the defendant. Raymond Sahadi, Lindau's delivery supervisor at the F.D.R. Station also testified with respect to general mail sorting and delivery operations and to the actions of the defendant.

B. The Investigation Begins

In the spring of 1976 Sixteen Magazine, Inc. had been receiving numerous complaints from customers that various mail orders had received no response. (Tr. 24).^{*} The magazine's daily mail included money and checks. (Tr. 28). Irene Boris, chief mail clerk and processor of subscriptions, accordingly communicated with the Postal Inspection Service concerning the fact that "a lot of mail" was apparently missing from among the several thousand letters received by the magazine each day. (Tr. 24, 26), Mrs. Boris also observed that some

^{*} Citations to "Tr." refer to pages of the trial transcript; citations to "Br." refers to pages of Lindau's brief; citations to "GX" refer to Government's Exhibits.

letters had been opened and resealed and bore double postmarks. (Tr. 27, 28).

The work area in the F.D.R. Post Office, where the mail for Sixteen Magazine was processed prior to delivery, contains a clerks' section where all mail is sorted and distributed into a series of wooden cases, each with forty-nine consecutive separations (Tr. 31-32) or pigeonholes. Each pigeonhole is about five inches square, corresponds to a particular letter carrier's route, and is appropriately labeled with the route number. (Tr. 31-32). The cases are lined up back to back, approximately eighteen to an aisle, with thirty-six sorting clerks on stools working through the night in each aisle. (Tr. 32, 101-02). Some of the cases, called "wing cases," are "L" shaped with a perpendicular addition at a 45 degree angle, and these contain additional pigeonholes for an extra fiftieth route. (Tr. 31). These "wing" cases are referred to as "holdouts" and are generally reserved for businesses with large amounts of mail. (Tr. 31).

Sixteen Magazine mail, because of its volume, has a box on such a wing. (Tr. 102). It was the practice for letter carriers from each route, before they commenced deliveries, to go into the clerks' aisles, and "sweep" the mail, each one taking mail from the pigeonhole corresponding to his own route number from the various cases. (Tr. 33). The individual carrier would walk up and down the aisles of cases, picking out mail for his route and putting it into a plastic tray. (Tr. 33). By virtue of Postal regulations which are communicated orally and in writing, every carrier knows, when he bids on and is assigned a route, what mail he is to take; unless instructed to the contrary by a supervisor, he is to take only that mail. (Tr. 42-45). At 6:45 a.m. a final sweep of mail is made after which the mailman

carries his trays of mail back to his own sorting case, called a letter case. (Tr. 35).*

On May 4, 1976, Frank Popoli, a postal employee for thirty years and a special investigator for the past eleven, was in the lookout gallery of the F.D.R. Post Office. (Tr. 52). From this enclosure, consisting of a catwalk with a one-way mirror, he was able to observe the activities of the employees on the work floor without being seen. (Tr. 52). Because of the complaints from Sixteen Magazine concerning missing mail, and because torn empty envelopes addressed to Sixteen Magazine had been found in a trash can near the F.D.R. Station, Popoli was surveilling the employees with particular attention to the wing case with the Sixteen Magazine mail separation. (Tr. 52-53).

At approximately 7:45 a.m., when the sorting clerks took their standard coffee break, Popoli and Inspector Christine Macho (Tr. 59) who was using binoculars (Tr. 72), observed Lindau, carrying a mail tray, come into the area where the distribution cases were. (Tr. 54). Lindau, a letter carrier for approximately nine years (Tr. 30) had been assigned to one route, Route 13, for a little more than a year. (Tr. 30, 55). Popoli observed Lindau, who was supposed to be removing mail from only one separation, Route 13, taking mail from six or seven other separations. (Tr. 55-56). Lindau

* Letter cases have a series of narrow partitioned metal tiers, with a street address strip running below each tier. (Tr. 35). Here the sorting process is further refined as each carrier places his mail tray on a waist high shelf and breaks down the mail from his route by specific building number, placing the mail in the appropriate numbered partition for each address on his route. Thus the mail, previously sorted only by route, was now arranged in the sequence the carrier would bundle it into his bag for delivery.

examined this mail, selectively removing certain letters, some from the Sixteen Magazine mail in the wing case. (Tr. 55). Lindau was seen using a large colored envelope stuck in his tray as a separation, placing mail from his own route 13 to the left of the tray, and mail from Sixteen Magazine to the right. (Tr. 55, 73-74).*

After having selected certain letters, Lindau always left some mail in the route boxes from which he improperly removed mail. This also deviated from the normal practice in which letter carriers remove all the mail from a given separation. (Tr. 55). While performing these actions Lindau's behavior was furtive. As he went from mail case to mail case he constantly glanced up and down the aisles, immediately leaving an aisle when another postal employee entered it. (Tr. 56). Waiting out of sight, (Tr. 73) and returning when the other had gone, (Tr. 57, 73) he looked to the right and left and over his shoulder. (Tr. 73). Before leaving the post office on May 4th, Lindau put the mail from Sixteen Magazine, unbundled (Tr. 58) in the bottom of his bag and began to walk off. (Tr. 74). He paused, came back to his mail tray, took another handful of letters and put them in the bag, presumably over the Sixteen Magazine mail and left. (Tr. 74). Lindau left behind in the post office mail from the left side of his tray, from his own route. (Tr. 58-59).

On the following day, May 5, 1976, Special Investigator Popoli and Inspector Macho, later joined by Inspector Lynford Nehil (Tr. 60), were again in the lookout gallery. Lindau was seen working on his own

* There was no need, in the normal course of postal practice to do this (Tr. 56).

Route, number 13, around 6 a.m. (Tr. 60, 75). At this time all the sorting clerks were distributing mail around him. (Tr. 60). At 7:45 a.m. on May 5, 1977, the clerks took their coffee break (Tr. 61, 75) and two or three minutes later Lindau left the route carrier-case area and entered the virtually deserted (Tr. 102) "city-up" or sorting section. (Tr. 61, 75). It was neither an authorized time to make another "mail sweep," nor was one necessary. (Tr. 61-62).

Again Lindau was "very alert" and "kept looking up and down the aisle". (Tr. 61). Just as before, using a colored envelope as a divider (Tr. 61) in the plastic letter tray he carried (Tr. 76, 101), Lindau looked over and selected certain mail from pigeon holes other than his own route, (Tr. 61, 76, 101) and then reached up and removed mail specifically from the Sixteen Magazine separation. (Tr. 61, 76). On this occasion Lindau was observed to take mail from "eight different separations" other than his own (Popoli, Tr. 62), "as much as five, six, seven pigeonholes all around the case" (Macho, Tr. 76) or "approximately eight separations" assigned to other routes. (Nehil, Tr. 101). Most of these were not physically proximate to the Route 13 box, Lindau's own. (Tr. 101, 102).

At about this time Inspectors Macho and Nehil left the gallery and went to the employees' entrance on the ground floor downstairs. (Tr. 76, 102). They had two way radios, and were in communication with Special Investigator Popoli. (Tr. 76, 102). Lindau, having returned to his own work area among the carrier cases (Tr. 62) bundled up the Sixteen Magazine letters along with the other mail he was not entitled to have from the right of the envelope used as a divider in his tray. (Tr. 63). He took three bundles, placed them into the bottom

of his mail sack, and covered them up with mail from Route 13, his own route. (Tr. 63).

After Investigator Popoli saw Lindau leaving the Route 13 work area, he telephoned Raymond Sahadi, the postal delivery supervisor on the floor and asked him to check the tray Lindau had left behind to determine whether Lindau had taken the mail from Sixteen Magazine out of the building with him. (Tr. 63, 64). Sahadi, down on the work floor, did so and found only mail from Lindau's own route, 13, in the tray. (Tr. 37-39). Sahadi accordingly advised Popoli (Tr. 38) who communicated this to Inspectors Macho and Nehil at street level. (Tr. 65).

C. The Arrest

After Inspectors Macho and Nehil received Popoli's first radio communication, they observed Lindau, carrying a bag of mail (Tr. 76), walk out the employees' 55th Street entrance. Inspector Nehil followed (Tr. 103) him, as did Inspector Macho (Tr. 76-77) who left shortly after Nehil.

Inspector Nehil followed Lindau on to Third Avenue and then west on 53rd Street. (Tr. 103). Between Third and Lexington Avenues, Inspector Macho joined Inspector Nehil and the two approached Lindau and identified themselves. (Tr. 77, 102-04). The inspectors told Lindau they wished to speak to him back at the post office. (Tr. 77, 104). At this point, without having been advised of the context in which the Inspectors wished to talk to him, Lindau offered them his postal "arrow" or master key, which is normally retained by letter carriers unless they are ill or relieved of their duties. (Tr. 47). Inspector Nehil, who had not yet advised Lindau of his rights, instructed him to "hang onto

it, and don't talk until we get back to the office." (Tr. 104).

At the Post Office, Lindau was advised of his rights by Inspector Macho in the presence of Inspector Nehil, and signed a warning and waiver form acknowledging that he understood them. (Tr. 80; GX 16).

An examination of Lindau's mail satchel disclosed 258 letters from routes other than his own Route 13; these were in the bottom of the bag buried beneath mail from Lindau's own route. (Tr. 81-82, 104-05). They included the fourteen letters (GX 1-14) addressed to Sixteen Magazine (Tr. 81) which was on route 30. (Tr. 39).

When confronted by Inspector Nehil with the Sixteen Magazine mail, Lindau acknowledged that it was not from his own route, but claimed he did not know how it got into his mail bag. (Tr. 85, 105). Other mail, not from Route 13, found in Lindau's bag was addressed to the Citibank, Catholic Near East Charities, the National Audubon Society and Super Values, Inc. The street addresses of Catholic Near East Charities, and of Sixteen Magazine were at least five or six blocks north of Lindau's own route. (Tr. 107).

Inspectors Nehil and Macho also discovered that Lindau had "between ten and twenty OTB betting slips" on his person. (Tr. 105). After a suggestion by Inspector Nehil that the betting slips "might be part of your problem," Lindau responded affirmatively. (Tr. 86).

At the office of the United States Attorney, Lindau was again advised of his rights by an Assistant United States Attorney. (Tr. 87). He conceded that there had been mail in his bag other than for his particular route, but claimed that it was there when he went to pick up

his mail and that he didn't know how the mail got there. (Tr. 88). Lindau further stated that he had made a mistake in not checking his bag before he took it out into the street. (Tr. 88).

The Defendant's Case

Lindau, testifying in his own behalf, first described his normal duties which included the boxing, sorting and delivery of mail. (Tr. 112). Lindau admitted that he intentionally took mail from routes other than his own on May 5, 1976 (Tr. 113), but claimed he did so because he didn't have sufficient mail in his bag to justify the time he would have been out in the street. (Tr. 113-14). Lindau explained that he engaged in this practice to deceive his supervisors and facilitate his attempts "to goof off, like most of us do". (Tr. 114). Lindau observed that he had neither opened nor mutilated any of the mail and asserted that it had been his intention to "put it back in the system" by remailing it. (Tr. 115). He firmly denied any intention to keep it for himself.

Under cross-examination Lindau conceded that he had taken mail from routes other than his own on prior occasions, "every now and then." (Tr. 117). He also admitted that he had taken the letters selectively, picking out some and leaving others. (Tr. 118). When asked to explain why this was necessary if he had simply needed bulk to fill up his bag, Lindau stated that

"Sometimes you do get money in the mail and sometimes the money, you can see through the envelope. Like children, adults, they put money in the mail, they put quarters in the mail . . . I had to be selective." (Tr. 118-19).

Lindau confessed that he had, in fact, lied to the Inspectors when he claimed, the day of his arrest, that

he had not known how the mail from other routes got into his bag. Lindau further acknowledged that "I have a problem with gambling", (Tr. 120) and that, five days after his arrest for the instant charges, he had committed a larceny in New Jersey and subsequently pleaded guilty there. (Tr. 121-22).

ARGUMENT

POINT I

The Evidence Adduced at Trial Was More Than Sufficient To Support the Verdict of the Jury.

Lindau claims on appeal that the evidence adduced during the trial was insufficient to sustain the jury's verdict, relying particularly on an asserted absence of any act consistent with conversion, or from which the jury could properly conclude that he was wrongfully appropriating to his own use the letters addressed to Sixteen Magazine. (Br. 10). This contention is meritless and utterly unsupported by the record. The entire corpus of evidence, both the Government and defense cases, see *United States v. Mariani*, 539 F.2d 915, 917 (2d Cir. 1976), viewed, as it must be in the light most favorable to the Government, was more than sufficient for a reasonable jury to convict. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), cert. denied, 419 U.S. 827 (1974); *United States v. Mariani*, supra, 539 F.2d at 917.

Even the briefest review of the facts compels this conclusion. In the Spring of 1976, Sixteen Magazine Inc. had not received substantial quantities of its mail, which often contained checks and money. (Tr. 24, 28). On two consecutive days, May 4th and 5th, 1976, Lindau

was observed by postal inspectors selectively and furtively removing mail from the Sixteen Magazine mail separation during the sorting clerk's coffee break. (Tr. 55, 60, 61, 73-76, 101). Sixteen Magazine was not on his mail route, and its wing case, clearly labeled, was not physically proximate to Lindau's own route pigeon holes. (Tr. 39, 40, 101-02). Lindau separated the embezzled mail of other routes from that of his own by means of a large colored envelope in his mail tray. (Tr. 55).

When confronted and apprehended by postal inspectors Lindau had over two hundred and fifty pieces of mail from eight routes other than his own. These included letters addressed to Citibank, Catholic Charities and Super Values as well as Government's Exhibits 1-14, the letters to Sixteen Magazine, all of which were concealed at the bottom of his bag, covered by mail properly in his possession from his own Route 13. (Tr. 81-82, 106). Even prior to being informed of the inspectors' purpose in approaching him, Lindau proffered his postal arrow key, which is normally retained by letter carriers unless they are ill or relieved of their duties—an eventuality Lindau evidently anticipated, thus clearly showing his consciousness of guilt. (Tr. 47, 104).

In addition, Lindau made false exculpatory statements to the inspectors (Tr. 85, 105) when he denied knowing how the misappropriated mail got into his mail bag. This of course, justified an inference of consciousness of guilt. *United States v. Di Stefano*, Dkt. No. 76-1581, slip op. 3539, 3556-58 (2d Cir., May 16, 1977); *United States v. Johnson*, 513 F.2d 819 (2d Cir. 1975); *United States v. Gentile*, 530 F.2d 461, 465 (2d Cir.), cert. denied, 425 U.S. 903 (1976); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Lindau, when arrested, had between ten and twenty OTB betting slips on his person. (Tr. 86, 105). During the trial it was established through Lindau's own statements (Tr. 86) and trial testimony (Tr. 120) that he had "a problem with gambling". He further conceded at trial that he had intentionally taken the mail found in his bag from the other routes and that he had engaged in this practice "every now and then". (Tr. 117, 120).

Finally, and most significantly, Lindau confessed at trial—perhaps compulsively—that he took certain letters and left other based on the appearance of the letter and the probability that it contained money. (Tr. 118-19). This admission, of course, was totally inconsistent with his assertion that he was merely filling up his mailbag for bulk and never intended to keep any mail for himself. Indeed, it was further established, that while taking mail from several other letter carriers' routes, Lindau left sorted mail from his own route behind in his mail tray the day of his arrest—a fact strikingly at odds with his purported explanation. (Tr. 38-39). There was also proof of a subsequent similar act, a larceny committed by Lindau in the interval between his arrest and the trial (Tr. 121-22) which was clearly probative of his intent and knowledge. *United States v. Erb*, 543 F.2d 438, 442 (2d Cir.), *cert. denied*, 97 S.Ct. 493 (Nov. 29, 1976); *United States v. Nemes*, Dkt. No. 76-1584, slip op. 3509, 3511 (2d Cir., May 16, 1977).

Proof of Lindau's intent to steal the mail can be circumstantial, *United States v. Chestnut*, 533 F.2d 40, 48 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976), and in the context of this case it was not even necessary that the embezzled items be carried off the premises, of the Post Office, although that occurred. The offense is complete and the defendant may be convicted when he

secretes the mail matter and is detained by inspectors on attempting to leave the post office premises. *United States v. Holley*, 463 F.2d 634 (5th Cir. 1972).

Lindau's explanations, as adduced at trial and pressed by counsel for the defense in summation, were rejected by the jury, which had ample basis to reach a verdict of guilty.* *United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972). Although Lindau argues that the jury could or should just as easily have drawn relatively innocent inferences as to his intent and actions based upon the events of May 4th and 5th, 1976, "the simple answer is that this argument was rejected by the jury, and the verdict was amply supported by the record." *United States v. Cavallaro*, Dkt. No. 76-1437, slip op. 3005, 3010 (2d Cir., April 19, 1977). In addition, as this Court has explicitly noted, "The prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstantial facts where, as here, the jury could easily have properly inferred guilty possession from those same facts." *United States v. Singleton*, 532 F.2d 199, 203 (2d Cir. 1976). Finally, of course, the question of Lindau's credibility—and the probative weight to be given to his manner of response at trial—was for the jury. *United States v. Hawley*, Dkt. No. 76-1469, slip op. 3239, 3242 (2d Cir., April 27, 1977).

In short, Lindau's claim is frivolous.**

* The District Court, out of the presence of the jury and after the proceedings, observed "The only thing I really have as far as Mr. Lindau is concerned is that I am convinced that he lied on the witness stand" (Tr. 158).

** We note, in passing, that many of the cases cited by Lindau in his brief for the argument that the evidence was insufficient and the charge erroneous are inapposite, or are cited for

[Footnote continued on following page]

POINT II

The District Court Properly Instructed the Jury.

Lindau contends that Judge Carter erred in refusing to charge the jury in accordance with his proposed instruction. His contention is frivolous. First, Lindau voiced "no objection . . . no exceptions" (Tr. 150) whatever to the District Court's instructions to the jury, and thus did not preserve for appeal his present argument. *United States v. Pelose*, 538 F.2d 41, 43 (2d Cir. 1976).^{*} Second, the District Court was plainly correct

propositions that they do not endorse. *United States v. Davis*, 461 F.2d 83, 91 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972) was an external mail theft case in which one defendant clearly took the mail, but not from an authorized mail depository. (Br. 12). In *United States v. Kehoe*, 365 F. Supp. 920, 922 (S.D. Texas, 1973) (Br. 14) the court merely held that real property did not fall within the ambit of embezzlement, as proscribed in 18 U.S.C. § 657.

United States v. Trevino, 491 F.2d 74, 75 (5th Cir. 1974), advanced as authority in Lindau's requests to charge (Br. 5a), holds only that embezzlement as articulated in 18 U.S.C. § 1709 is not the same as stealing as used in 18 U.S.C. § 1708, since embezzlement requires lawful access or entrustment, and the latter does not. The requirement that the letters be "removed . . . from the United States Mail System" (Br. 5a) means only that the subject matter must have been intended to be conveyed by the mail, which was, in this case, undisputed. Finally, Lindau's transparent effort to lend an innocent aura to his actions by characterizing them as mere "commingling" must fail as it ignores the fact that while he came into possession of the Sixteen mail by virtue of his position, he was not entitled to possess much less "commingle" that mail.

^{*} As this Court has noted, even if a charge inconsistent with that ultimately given is requested by the defendant, he must nonetheless make a contemporaneous objection in order to comply with the specific requirements of F.R. Crim. P. 30 and to preserve the issue for appeal. *United States v. Nathan*, 536 F.2d 988, 992 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976).

in its instruction to the jury regarding the definition of intentional embezzlement.*

In response to an inquiry by the jury, the Court again defined embezzlement:

THE COURT: Ladies and gentlemen, you have asked me to clarify what embezzlement means, and you say, "Taking letters unlawfully from the post office, do the letters have to be opened?"

The answer to the last question is no. That is, do the letters have to be opened?

The answer is no.

A person is said to embezzle something if he is entrusted with it or comes into possession of it by virtue of some office or position of trust and wrongfully take it or wilfully misappropriates it.

* Judge Carter charged the jury as follows:

With respect to the fourth element that must be proved, that the defendant wilfully and knowingly embezzled the letters set forth in the indictment on or about May 5, 1976, let me give a few words of explanation.

A person is said to embezzle something if he is entrusted with it or comes into possession of it by virtue of some office or position of trust and wrongfully takes it or wilfully misappropriates it.

An act is done knowingly if it is done voluntarily and not because of mistake, inadvertence or other innocent reason. An act is done wilfully if it is done knowingly, deliberately and with an evil motive or purpose.

An act is not done wilfully if it is done as a result of a mistake, carelessness, lack of an evil motive or purpose or for some other innocent reason.

It is not necessary for you to find that the defendant knew he was breaking a particular law, and whether or not an act is knowing and wilful has nothing to do with the defendant's personal or private reasons for committing the act, so long as the act was done with *an evil purpose* or motive.

(Tr. 145-46) (emphasis added).

The point is that what you are required to do on the basis of that is to take the evidence in the case and make your determination as to whether from the evidence you have, the letters in question were wrongfully taken or wilfully misappropriated, and you have to make that determination, as I have indicated, based upon a determination as to whether the act was wilful, was done wilfully or not. And I defined that to you.

So that it isn't a question of whether they have to be opened or anything like that. The question is what you find from the circumstances and from the facts as you find them as to whether or not you conclude that the letters were wrongfully taken and that there was the intent to misappropriate them. And you have to reach that conclusion based upon your analysis of the facts and the circumstances.

(Tr. 151-52).

The Court's exposition of the well-established and uncomplicated definition of embezzlement was virtually identical to the standard instruction found in E. Devitt & C. Blackmar, 1 *Federal Jury Practice and Instructions*, § 39.05 (2d ed. 1970); see, 27 F.R.D. 148 (1960), and consistently approved by those few courts that have found reason to define this common crime. *Moore v. United States*, 160 U.S. 268, 269-70 (1895); *United States v. Miller*, 520 F.2d 1208, 1211 (9th Cir. 1975). In *United States v. Alexander*, 415 F.2d 1352, 1357-58 (7th Cir. 1969), cert. denied, 397 U.S. 1014 (1970), the District Court, in the context of a jury request for an amplification of a mail embezzlement instruction, responded in a substantially similar manner.

In this case, the Court's instructions were almost verbatim the definition noted by the Ninth Circuit in

United States v. Miller, supra, 520 F.2d at 1211, cited by Lindau in his own brief (Br. 10). Moreover, the charge does not vary in any relevant respect from Lindau's own proposed instruction (Br. 6a) and he has no legitimate cause to complain that the Court instructed the jury in its own language.

Lindau's claim is frivolous.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK)

ss.:

Jacob Laufer being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8th day of June, 1977
he served 2 copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Armende Lesser, Esq.
475 Fifth Ave.
New York, N. Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jean Simon

Sworn to before me this

8th day of June, 1977

Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 44-150171
Commission Expires March 30, 1979

